suet, lard, lard-oil, vegetable-oil annotto, and other coloring matter, intestinal fat, and offal fat made in imitation or semblance of butter, or when so made, calculated or intended to be sold as butter or for butter.

STATEMENT

A statement of the facts will be found in the petition, pp. 1–5, *supra.*

ARGUMENT

The Circuit Court of Appeals concluded that the product manufactured and sold by respondent did not come within the statutory definition of taxable oleomargarine and that therefore the injunction awarded did not restrain the collection of a tax. (R. 86.) We submit that in this it erred. As will be hereafter shown, other courts have held that similar products are taxable under the Oleomargarine Act. In this case the Commissioner of Internal Revenue, the officer having general jurisdiction of the subject of assessing and collecting oleomargarine taxes, held that the product was taxable, and under color of his office, through the petitioner Collector, was proceeding to make collection. Under such circumstances this Court has repeatedly held that an injunction should not be granted and that the exclusive remedy is a suit to recover the tax after it is paid. *State Railroad Tax Cases,* 92 U. S. 575, 613; *Snyder* v. *Marks,* 109 U. S. 189, 192, 193; *Dodge* v. *Osborn,* 240 U. S. 118;

Graham v. *duPont*, 262 U. S. 234. Cf. *Smallwood* v. *Gallardo*, 275 U. S. 56. In *Snyder* v. *Marks*, *supra*, this Court said that the word "tax" as used in Section 3224 of the Revised Statutes meant (p. 192)—

> * * * that which is in a condition to be collected as a tax, and is claimed by the proper public officers to be a tax, although on the other side it is alleged to have been erroneously or illegally assessed.

And again (p. 193) that the inhibition of the section—

> * * * applies to all assessments of taxes, made under color of their offices, by internal revenue officers charged with general jurisdiction of the subject of assessing taxes against tobacco manufacturers. The remedy of a suit to recover back the tax after it is paid is provided by statute, and a suit to restrain its collection is forbidden. The remedy so given is exclusive, and no other remedy can be substituted for it.

This principle was again enunciated in *Graham* v. *du Pont*, *supra*, p. 255. Under these decisions the bar of Section 3224 of the Revised Statutes is absolute where the assessment is made by an officer having general jurisdiction over the subject matter and he asserts that the assessment is valid.

The Circuit Court of Appeals in its opinion (R. 86–88) attempts to bring this case within the possible exception to Section 3224 of the Revised Stat-

utes noted by this Court in *Dodge* v. *Osborn, supra,* p. 122, and applied in *Hill* v. *Wallace,* 259 U. S. 44. This Court, however, in *Graham* v. *duPont, supra,* distinguished *Hill* v. *Wallace* by pointing out that the Government had in effect consented to a temporary injunction owing to the peculiar circumstances of that case, and that the case should be classed with *Lipke* v. *Lederer,* 259 U. S. 557, and *Regal Drug Co.* v. *Wardell,* 260 U. S. 386, which were brought to enjoin the collection of penalties in the guise of taxes (pp. 257–258). The instant case does not involve a penalty in the guise of a tax. *McCray* v. *United States,* 195 U. S. 27. The only other case in which this Court has recognized an exception to the application of Section 3224 of the Revised Statutes is *Dodge* v. *Brady,* 240 U. S. 122. The fact justifying the exception, however, was the futility of further litigation of questions which had been considered and adversely disposed of at the same term in *Brushaber* v. *Union Pac. R. R.* 240 U. S. 1.

The decision of the Circuit Court of Appeals that an injunction may properly be issued to enjoin the collection of a tax is in conflict with the decisions of the Circuit Court of Appeals for the Seventh Circuit in *Reinecke* v. *Peacock,* 3 F. (2d) 583, certiorari denied, 268 U. S. 699, reversing a decree enjoining the Collector of Internal Revenue from collecting taxes on the income of a trust distributed prior to assessment, and *Reinecke* v. *O. D. Jennings*

& Co., 16 F. (2d) 927, certiorari denied, 274 U. S. 753, reversing a decree enjoining the collection of a tax on slot machines claimed by the taxpayer not to be included within the definition of the statute. The Circuit Court of Appeals held in each case that even if the tax was not authorized by the statute, if the authorities believed it to be so the collection of the tax might not be enjoined. The decision of the Circuit Court of Appeals in this case is also in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in *Hernandez* v. *McGhee*, 294 Fed. 460, reversing a decree enjoining the collection of income taxes notwithstanding the contention of taxpayer that he had received no income subject to tax.

The decision of the Circuit Court of Appeals that the Standard Nut Product does not fall within the definition of oleomargarine is also in conflict with the opinion expressed by the Circuit Court of Appeals for the Eighth Circuit in *Harrow-Taylor Butter Co.* v. *Crooks*, 41 F. (2d) 627, in which a product known as Rich Nut Shortening composed of a mixture of the same ingredients as Standard Nut Product, with the exception of a preservative, was considered taxable under the Oleomargarine Act. While this is the only case reaching a Circuit Court of Appeals in which a compound similar to Standard Nut Product was held to be within the

definition of oleomargarine [1] it might be noted that there have been numerous unreported decisions of District Courts of the United States holding that vegetable oil compounds fall within the statute. See also *Standard Nut Margarine Company of Florida* v. *Jones, Collector,* decided by the District Court for the Eastern District of South Carolina November 28, 1930. The opinion is unreported. A copy is attached as an appendix (*infra*, pp. 16–27). The plaintiff in that case and the respondent in this case are the same. No appeal was taken from the decision.

The court below placed great reliance upon the fact that in two other cases Federal courts had issued injunctions against the collection of the oleomargarine tax on products which apparently are similar to the respondent's product. In *Higgins Manufacturing Co.* v. *Page,* 297 Fed. 644, the District Court for the District of Rhode Island, in an action *at law* to which the respondent here was not a party, held that the product then before the court was not taxable and that the taxpayer was entitled to a refund of the tax which it had paid. Several

[1] The court below referred to (R. 84) and seemed to rely upon its own *per curiam* decision in *Talmadge* v. *Baltimore Butterine Co.*, 37 F. (2d) 1014, affirming *Baltimore Butterine Co.* v. *Talmadge*, 32 F. (2d) 904. But that case arose under the Georgia Pure Food law and the sole question was whether the respondent's product was "adulterated or misbranded."

years thereafter the Collector again sought to collect a tax from this same taxpayer, and at the taxpayer's instance this collection was enjoined. *Higgins Manufacturing Co.* v. *Page,* 20 F. (2d) 948. At about the same time the Supreme Court of the District of Columbia in *Baltimore Butterine Co.* v. *Mellon,* unreported, granted a similar injunction, relying almost entirely upon the action which had been taken by the court in Rhode Island.[2]

As has been indicated above, one Circuit Court of Appeals and several District Courts have held that products similar to that involved here are taxable. The mere fact that two lower Federal courts have held that they are not so taxable does not, we submit, afford a sufficient basis for the issuance of an injunction. The very conflict of decisions shows that the question is one in which it can not be said that the Commissioner of Internal Revenue's action is arbitrary or, in the language of the court below (R. 86) "so unsubstantial as to be frivolous." Congress has expressly provided that such dis-

[2] It is true that no appeals were taken from either of these decisions granting injunctions. But an examination of the files in the Department of Justice shows that no appeal was taken in the Rhode Island case because the taxpayer there had previously obtained a judgment at law that its product was not taxable, and that no appeal was taken in the case in the District of Columbia because of the negligence of a subordinate official in failing to file the necessary papers within the time required by statute.

putes shall be settled in an orderly manner by appeals to administrative officials with review at law by the courts. The decision below, in disregarding the plain terms of this statute, is erroneous.

If the decision of the court below affected simply a matter of procedure—namely that determination of the merits of the tax could be had in equity as well as at law—and there had been a proper determination of the question upon the merits, there would be no substantial reason for requiring the taxpayer to start a new suit at law and try out the merits again. But we contend that the court below erred even on the testimony before it, and anyway there was no real trial on the merits. The taxpayer introduced but one witness, whose testimony related to only a few of the material allegations in the plaintiff's bill. The Government introduced no testimony, relying on its motion to dismiss based on Section 3224 of the Revised Statutes.

CONCLUSION

The decision of the court below is in conflict with the applicable decisions of this Court and with the decisions of the Circuit Courts of Appeals for the Seventh and Eighth Circuits. The question involved is of importance in connection with the practical administration of the revenue laws, and particularly with the administration of the Act here involved. It is, therefore, respectfully submitted

that the petition for a writ of certiorari should be granted.

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JULY, 1931.

APPENDIX

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF SOUTH CAROLINA

In Equity

THE STANDARD NUT MARGARINE COMPANY OF Florida, a Corporation, plaintiff

v.

JOHN F. JONES, INDIVIDUALLY AND AS COLLECTOR OF Internal Revenue for the District of South Carolina, defendant

MEMORANDUM OPINION

The plaintiff gave notice of an application for a restraining order against the defendant. While the notice given would ordinarily be insufficient to enable the defendant to be prepared to oppose the motion, nevertheless the court was of opinion that the importance of the matter demanded further consideration, and issued a restraining order, but set down the hearing of the motion for an interlocutory injunction at as early a date as practicable. The parties have now been heard upon that motion, and in view of the urgency of the matter, I have laid aside, as far as practicable, all other business, and given as much consideration as I could to the questions presented. It will be impracticable to do more than set forth briefly my views in the form of a memorandum opinion.

The plaintiff seeks to enjoin the Collector of Internal Revenue for South Carolina from proceeding in any way to collect a special license tax of $480 a year from wholesalers, and $48 per year from retailers, of its product, Southern Nut Product, assessed under the Oleomargarine Act of August 2, 1886, as amended. The case made is that the plaintiff manufactures Southern Nut Product in Jacksonville, Fla., and has an established business in South Carolina, with numerous wholesale jobbers and retailers who sell the product and are about to be taxed as such sellers on the ground that Southern Nut Product is oleomargarine under the definition of Section 2 of said Act; and that the dealers, for fear of the assessment of the tax, are refusing to handle plaintiff's goods, and its business is about to be destroyed. The contention is that the tax applies only to a product based on animal fats and that plaintiff's product contains only vegetable oils and that several courts have so decided. Plaintiff also contends that its product is not liable to the tax because not calculated or intended to be sold as butter or for butter. The defendant's case is that the definition in Section 2 of the Act properly construed includes imitations of butter made from vegetable oils, and that the Commissioner of Internal Revenue, under Section 14 of the Act, has found that this product is calculated or intended to be sold as or for butter, and has held it to be taxable, and that it is in fact made and sold as a butter substitute. The defendant denies that any court has finally adjudged plaintiff's product to be not taxable. The main contention of the defendant, however, is that Section 3224, R. S. U. S. of 1878

BRIEF IN SUPPORT OF THE PETITION

OPINIONS BELOW

No formal opinion of the District Court for the Southern District of Florida was filed. The court, however, expressed its views at the time of the hearing (R. 46–48, 73) which are otherwise unreported. The opinion of the Circuit Court of Appeals (R. 80–88) is reported in 49 F. (2d) 79.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on April 22, 1931. (R. 88.) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Where the Commissioner of Internal Revenue has determined that a tax is imposed upon a certain product as oleomargarine under the Act of August 2, 1886, c. 840, 24 Stat. 209 (U. S. C., Title 26, Sec. 541), may a suit in equity for the sole purpose of restraining collection be maintained against the Collector of Internal Revenue on the ground that no tax is imposed under a proper construction of the law, despite the prohibition of Section 3224 of the Revised Statutes?

2. Did the courts below err in holding that the product of the respondent was not oleomargarine within the meaning of the Act of August 2, 1886?

STATUTES INVOLVED

Section 3224 of the Revised Statutes (U. S. C., Title 26, Sec. 154) provides:

> No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.

Section 267 of the Judicial Code, c. 231, 36 Stat. 1087, 1163 (U. S. C., Title 28, Sec. 384) provides:

> Suits in equity shall not be sustained in any court of the United States in any case where a plain, adequate, and complete remedy may be had at law.

The Act of August 2, 1886, c. 840, 24 Stat. 209 (U. S. C., Title 26, Sec. 541), provides in part:

> SEC. 2. That for the purposes of this act certain manufactured substances, certain extracts, and certain mixtures and compounds, including such mixtures and compounds with butter, shall be known and designated as "oleomargarine", namely: All substances heretofore known as oleomargarine, oleo, oleomargarine-oil, butterine, lardine, suine, and neutral; all mixtures and compounds of oleomargarine, oleo, oleomargarine-oil, butterine, lardine, suine, and neutral; all lard extracts and tallow extracts; and all mixtures and compounds of tallow, beef-fat,

(U. S. Code, Title 26, Section 154) prohibits the granting of the injunction; that there is an adequate remedy at law by paying the tax and suing for its recovery; and that the plaintiff has no interest in the proposed tax against the dealers.

The facts of the case as developed before me upon the motion are substantially as follows:

The plaintiff manufactures a product which contains no animal fats whatsoever. It is identical with a product manufactured and sold by Higgins Manufacturing Company of Providence, R. I., known as "Nut-Z-All," which was held in a trial on the facts not to be oleomargarine and not taxable as such. *Higgins Mfg. Co.* v. *Page, Collector,* 297 Fed. 644.

That case was an action at law for the recovery of the tax in question and there was no appeal. The plaintiff, desiring to manufacture a similar product, made inquiry of the Collector of Internal Revenue at Jacksonville, Fla., and the Collector received from the Deputy Commissioner of Internal Revenue a letter, stating in substance that the products referred to were considered by his office as properly taxable, but in view of certain adverse court decisions, that no attempt was being made to hold them taxable at that time. The letter further used the following language:

> Accordingly the Standard Nut Margarine Co. has the same privilege of making a compound of the kind in question without tax-paying the same as oleomargarine as is being enjoyed by those manufacturers who obtained favorable decisions from the courts.

In reliance upon these decisions and the statement of the Commissioner, the plaintiff began the

manufacture of its product, and built up a large and lucrative business in different States, including South Carolina. Some question was made as to whether or not the value of its business in South Carolina exceeded $3,000; but I think the evidence is ample to sustain the contention that the value does exceed that amount, and I so find.

The plaintiff's product is compounded of cocoanut oil, peanut oil, salt, and an artificial coloring matter, and contains, as stated, no animal fats whatsoever. It is colored, and the coloring gives it the appearance of butter. The taste is similar to butter. It is put up in one-pound cartons, and each carton contains four quarter-pound packages. The cartons bear plain statements, in large letters, of the ingredients of the product, and expressly state that it is not sold as a substitute for any other product, but is for cooking, baking, and seasoning. The tissue wrapper on each quarter-pound bears the imprint in large, clear type of the name of the product, with the statement that it is pure, clean, and wholesome, and made from pure cocoanut and peanut oils. There is nothing whatever about the cartons or the wrappers to indicate that the product is intended to be used as butter. The Commissioner, however, has found that the product is actually sold by the retailers as a butter substitute and that the product is calculated or intended to be sold as or for butter.

The first question to be considered is whether or not this court is precluded from issuing an injunction by the terms of Section 3224 R. S., which reads: "No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." The defendant contends

that this statute is of universal application, so far as the Federal taxes are concerned, and that where the Commissioner has found the facts and ruled an article to be taxable, such action is final and the courts are precluded from issuing an injunction to restrain the tax. But I am not prepared to accede to the view that the courts are precluded by that section from issuing an injunction in all cases whatsoever. My view is that that section must be given a reasonable construction, and that it is inconceivable that Congress should intend that if the Commissioner should rule that an article clearly beyond the purview of the law should be taxed and the party has no remedy given by the law, he shall be entirely remediless. Such a construction of the Act, vesting in the executive officers of the Government the most absolute power, without redress and without appeal and without resource to the courts, is contrary to the whole spirit of our institutions. My view is that there may be and are exceptional cases which would render that statute inapplicable. I am of opinion that if the Commissioner should rule that an article clearly beyond the purview of the law should be taxed, without any reasonable basis whatever for such ruling, and the party is given no remedy at law, the court would have power to enjoin such arbitrary action. But if there is some reasonable basis for the Commissioner's decision, then I think his decision is final, so far as this remedy is concerned, and Section 3224 would apply, and the party would be entirely remitted to whatever remedy he may have at law. In this view of the case, it will be necessary to consider whether the action of the

Commissioner in holding the article in question taxable was so clearly without reasonable basis as to make his ruling arbitrary.

The plaintiff's first contention is that compounds which contain no animal fats are entirely excluded from the law and therefore its product, being purely a vegetable oil product, is not taxable. If this contention is correct and the statute clearly applies only to compounds of animal fats, then I think an injunction should issue, but it not only does not appear that vegetable oils are excluded from the operation of the Act, but upon the face of the Act, they would appear to be included.

On this point, the Act (24 Stats., p. 209, Sec. 2) reads as follows:

> and all mixtures and compounds of tallow, beef fat, suet, lard, lard-oil, vegetable-oil annotto, and other coloring matter, intestinal fat, and offal fat made in imitation or semblance of butter, or when so made, calculated or intended to be sold as butter or for butter.

The plaintiff contends that in the original engrossed Act and all the printed Acts, the expression "vegetable-oil annotto" is punctuated as appears above; that is, with a dash between "vegetable" and "oil" and no comma between "oil" and "annotto," and that "annotto" (which is a dye) is qualified by the words "vegetable-oil" and means a dye suspended in vegetable oils. In other words, the plaintiff contends that with that punctuation, the expression does not mean vegetable oils *and* annotto, but means "vegetable-oil annotto," a single product, which would exclude vegetable oils from the operation of the Act.

The defendant contends that the proper punctuation is to remove the dash from between "vegetable" and "oil" and place a comma after "oil," so as to make "vegetable oil" one of the forbidden elements of the product and "annotto" another. The defendant also contends that there is no such thing as "vegetable-oil annotto," while the plaintiff contends that there *is* such a substance. It is elementary, of course, that punctuation is a fallible guide and that courts will read Acts of Congress with such punctuation as may be demanded by the context and subject matter. On the face of the Act, the court is of opinion that the proper punctuation would be to place the comma after "oil," so as to bring "vegetable oils" within the purview of the Act. The court has no judicial knowledge as to whether there is such a product as "vegetable-oil annotto" or not, and has been unable to find it mentioned in any work so as to enable the court to take judicial cognizance thereof, nor has any evidence been produced before the court to show that there is such a product. There is a dye called "annotto," whose definition may be found in any standard dictionary. Annotto (or anatta, anatto, annatto, or arnotto, for it is thus variously spelled) is a dye or coloring matter from the seeds of the tree Arnotto. Its colors being fugitive, its chief use is in coloring butter, cheese, and varnish. It appears that the Commissioner, presumably upon ascertaining the facts, has ruled that there is no such substance as "vegetable-oil annotto." It appears to me, therefore, that under the present state of the evidence before me, the proper punctuation would be to place the comma after the word "oil,"

so as to include vegetable oils. Products from such oils are certainly as such within the spirit of the Act as products of animal fats only.

But the plaintiff contends that even if vegetable oil products are included, nevertheless its product is not calculated or intended to be sold as butter or for butter. There is no doubt that the plaintiff has taken every precaution to warn purchasers and consumers that its product is not to be used or sold as a butter substitute. Even the most negligent purchaser ought to be able to know from the cartons and the printing upon the inner wrappers of each quarter-pound section that he is not buying butter or a substitute for butter. But nevertheless it appears that the product looks like butter so as to be indistinguishable to the naked eye; that it tastes like butter; that it is frequently used by many people as butter; that some prefer it; and that dealers do sell it as a substitute for butter. In these circumstances, I am not prepared to say that the Commissioner's ruling that the product is calculated or intended to be sold as butter is so utterly baseless as to be arbitrary and entitle the plaintiff to an injunction, despite the provisions of R. S. Section 3224. I do not think that the words "calculated or intended" in the statute are co-extensive. While the words are synonymous, there is nevertheless a shade of difference in their meaning. It is true that the word "calculated," when used accurately, implies a plan or device, or an intentional adaptation, and a purist in the use of English would perhaps use it only in that sense; but it is frequently, though perhaps inaccurately, used in the sense of "fitted" or "adapted" to a certain end, without regard to intention. Many good writers have so used it. For

example, Washington Irving, whose English is not to be lightly questioned, so uses it; for in The Sketch Book, Rural Life in England, p. 82, he says, "An immense metropolis like London is *calculated* to make men selfish and uninteresting." It is plain that Irving did not mean that such a result had been *intended*. Even though the plaintiff may not have intended its product to be sold as or for butter, nevertheless the Commissioner from the facts might not unreasonably conclude that the product is calculated to be so sold. In brief, the Commissioner's ruling in this respect is not so clearly without reasonable basis as to warrant the court in issuing an injunction in the face of the provisions of R. S. Section 3224. The dealers who are called upon to pay the tax have a remedy provided by law by which they may pay the tax, and sue to recover the same; and I think, therefore, for the reasons stated, that R. S. Section 3224 precludes the court from issuing an injunction under the facts of this case.

But the plaintiff contends that this is one of the exceptional cases in which an injunction may issue and that there is no legal remedy afforded it whatsoever. The point is made that the remedy by suit and recovery of the tax is afforded to the dealer who is taxed, and not to the plaintiff whose business is interferred with, and who is not a party to the tax; that the plaintiff has no legal right to pay the tax for the dealer or to use his name in a suit to recover it, for the dealer may prefer not to involve himself in the controversy; and that since the damage done would be really incapable of computation, if the plaintiff's business were unlawfully destroyed, a case for interference by equitable preven-

tion would exist. The plaintiff relies upon the case of *Hill* v. *Wallace,* 259 U. S. 44, 62. That case does hold that Section 3224 is not of universal application, and that there may be extraordinary and entirely exceptional circumstances which would render an injunction proper in a tax case. See also *Dodge* v. *Osborne,* 240 U. S. 118. But I do not think this case is controlled by the principle laid down in *Hill* v. *Wallace.* There are exceptional cases where the statute does not apply, but I do not think this case is one of them. Congress has seen fit to levy a tax on the dealers in certain articles, and those dealers are given an adequate remedy at law. Now comes the manufacturer, who says that his business will be broken up because the dealers do not choose to pay the tax or to avail themselves of their remedy at law, and that therefore *he* must be granted an injunction. If this is true, then Section 3224 will be practically nullified so far as excise taxes upon the various articles which enter into commerce are concerned. All the various articles which Congress may see fit to tax are manufactured somewhere by some person. If the principle is to prevail that the manufacturer whose tax is not in question may come in and question the tax imposed upon the dealers, it would paralyze the arm of the Government in the collection of excise taxes on any article that is the subject of manufacture and commerce.

It is impracticable, within the limited time at my disposal, to enter into any review of the numerous cases which the plaintiff has cited. I have considered them very carefully, and they are all distinguishable from the present case. Much stress has

been laid upon *Higgins Mfg. Co.* v. *Page,* 20 Fed. (2d) 948; but there the nontaxability of the very subject of litigation had been judicially determined in a suit between the same parties. The effort to tax, notwithstanding the judgment, made a very exceptional case. It is not so in this case, for the only litigation with this plaintiff about its product is still pending on appeal, and has resulted in a final adjudication either way.

Other courts have reached the conclusion that a product similar to that of the plaintiff is taxable or that Section 3224 precludes an injunction. Judge Reeves, in the case of *Harrow-Taylor Butter Co.* v. *Crookes,* reached the conclusion that a product like this was taxable and the Circuit Court of Appeals for the Eighth Circuit, although dismissing the appeal on other grounds, stated that they were of opinion that the trial court was justified in its decision. Judge Sibley in the Northern District of Georgia held that Section 3224 prohibited an injunction in a similar case.

I have been impressed with the view that this is a very hard case for the plaintiff. From the record before me, it appears that the plaintiff acted in good faith in relying upon the letter of the Commissioner. But I do not think that the question was *res adjudicata* or that the Commissioner was estopped from changing his ruling, even if it be deemed a ruling. No tax system has ever yet been devised that will not work hardship sometimes, either in its imposition or method of enforcement. In the present state of the law, parties are compelled to rely in great measure upon the fairness of the executive officers of the Government, and an appeal to Con-

gress. R. S. Section 3224 precludes the court from giving relief. The motion for a preliminary injunction must therefore be denied and the restraining order heretofore granted must be dissolved.

Let the attorneys for the defendant prepare an order in accordance with this memorandum opinion and present the same within ten (10) days from this date to the court for signature, serving a copy thereof upon the attorneys for the plaintiff, with at least four (4) days notice of the time and place when it will be presented.

ERNEST F. COCHRAN,
U. S. District Judge.

CHARLESTON, S. C., *November 28, 1930.*

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No. 251

In the Supreme Court of the United States

OCTOBER TERM, 1931.

PETER H. MILLER, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF FLORIDA, PETITIONER

v.

THE STANDARD NUT MARGARINE COMPANY OF FLORIDA, A CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

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In the Supreme Court of the United States

OCTOBER TERM, 1931

No. 251

PETER H. MILLER, INDIVIDUALLY AND AS COLLECTOR of Internal Revenue for the District of Florida, petitioner

v.

THE STANDARD NUT MARGARINE COMPANY OF Florida, a Corporation

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

No formal opinion of the District Court for the Southern District of Florida was filed. The court, however, expressed its views at the time of the hearing (R. 43–45, 69), which are otherwise unreported. The opinion of the Circuit Court of Appeals (R. 74–83) is reported in 49 F. (2d) 79.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 22, 1931. (R. 83.) The petition for a writ of certiorari was filed July 22, 1931, and was granted October 19, 1931. (R. 84–85.)

QUESTION PRESENTED

Where the Commissioner of Internal Revenue has assessed a tax upon a certain product as oleomargarine under the Act of August 2, 1886, c. 840, 24 Stat. 209 (U. S. C., Title 26, Sec. 541), may a suit in equity for the sole purpose of restraining collection of the tax assessed be maintained against the Collector of Internal Revenue when the real ground of the suit is that the statute, properly construed, does not authorize the assessment of a tax upon the product in question?

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set out in Appendix A, *infra,* pp. 30–35.

STATEMENT

The respondent taxpayer is a Florida corporation engaged in the manufacture and sale of a product known as Southern Nut Product, a mixture or compound of cocoanut oil, peanut oil, salt, water, and harmless coloring matter. (R. 1.) Prior to the commencement of this action the Commissioner of Internal Revenue had decided that this compound was taxable as colored oleomar-

garine and assessed a tax of $5,000 on 50,000 pounds of the compound estimated to have been produced during the month of January, 1929. (R. 9.) Suit was brought to restrain collection of this tax. The bill of complaint alleged (R. 11–12) that Southern Nut Product is composed of vegetable oils and coloring matter and is not oleomargarine as that term is defined in Section 2 of the Act of August 2, 1886, c. 840, 24 Stat. 209 (U. S. C., Title 26, Sec. 541, *infra,* p. 30), and that its taxation is therefore not justified or authorized by that Act. The bill further alleged in substance that, relying upon the decision of the District Court for Rhode Island in *Higgins Manufacturing Company* v. *Page,* 297 Fed. 644, and certain rulings and letters of the Treasury Department which led it to believe that its product would not be held to be subject to tax, respondent commenced the manufacture of Southern Nut Product. (R. 3–8.) The bill also alleged that the Act of August 2, 1886, is unconstitutional for reasons stated in the bill. (R. 12.) It was further alleged that the respondent was without adequate remedy at law for reasons stated in the bill. (R. 10.) Petitioner's amended answer to the bill of complaint contained certain admissions and denials, alleged that Southern Nut Product is artificially colored oleomargarine and is taxable pursuant to the Act (R. 30), and asserted that the court was without jurisdiction to restrain the collection of the tax because of the provisions of Section 3224 of the